William N. Sinclair (SBN 222502)
(bsinclair@mdattorney.com)
Steven D. Silverman (Admitted *Pro Hac Vice*)
(ssilverman@mdattorney.com)
Stephen G. Grygiel
(sgrygiel@ mdattorney.com)
Phillip J. Closius (Admitted *Pro Hac Vice*)
(pclosius@ mdattorney.com)
Alexander Williams (Admitted *Pro Hac Vice*)
awilliams@mdattorney.com
SILVERMAN|THOMPSON|SLUTKIN|WHITE|LLC
201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432

Thomas J. Byrne (SBN 179984)
(tbyrne@nbolaw.com
Mel T. Owens (SBN 226146)
(mowens@nbolaw.com)
NAMANNY BYRNE & OWENS, P.C.
2 South Pointe Drive, Suite 245
Lake Forest, CA 92630
Telephone: (949) 452-0700
Facsimile: (949) 452-0707

Stuart A. Davidson (Admitted *Pro Hac Vice*)
(sdavidson@rgrdlaw.com)
Mark J. Dearman (Admitted *Pro Hac Vice*)
(mdearman@rgrdlaw.com)
Jason H. Alperstein (Admitted *Pro Hac Vice*)
(jalperstein@rgrdlaw.com)
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
Facsimile: (561) 750-3364

Attorneys for Plaintiffs

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ETOPIA EVANS, as the Representative of the Estate of Charles Evans, et al.,

Plaintiffs,

vs.

ARIZONA CARDINALS FOOTBALL CLUB, LLC, et al.,

Defendants.

Case No. 3:16-cv-01030-WHA

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT AND FOR SUMMARY JUDGMENT ON THE INDIVIDUAL CLAIMS OF CERTAIN PLAINTIFFS

Date: April 27, 2017
Time: 8:00 a.m.
Courtroom: 8, 19th Floor
Honorable William Alsup

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CASES

Plaintiffs, by and through undersigned counsel and pursuant to Federal Rules of Civil Procedure 12 and 56, respectfully submit the following memorandum in opposition to Defendants' Motion to Dismiss the Second Amended Complaint ("SAC") and for Summary Judgment on the Individual Claims of Certain Plaintiffs ("Motion") and state as follows:

INTRODUCTION

In its February 3 Order dismissing in part Plaintiffs' first amended complaint, the Court advised Plaintiffs to plead their best case. The Clubs seize on that notion, arguing in their motion to dismiss and for summary judgment that Plaintiffs have failed to do so. But pleading one's best case is not yet the standard for ruling on a 12(b)(6) motion. Rather, plausibility of a plaintiff's claims viewed in light of Rule 9, and its relaxed standard for concealment claims, remains the standard, one which Plaintiffs have satisfied.

Much of the case law cited by the Clubs for the summary judgment portion of their motion makes the point that Plaintiffs have made throughout this litigation – that a plaintiff must first know of the cause of their injury, along with other factors, before the statute begins to run. Applying that case law here, summary judgment is not warranted on the statute of limitations defense raised by the Clubs.

ARGUMENT

For the following reasons, neither dismissal nor summary judgment is warranted and the Court should therefore dismiss the Motion.

I. PLAINTIFFS HAVE ADEQUATELY PLED THEIR CLAIMS.

The Plaintiffs have alleged intentional misrepresentation and concealment claims against the Clubs for whom they played. The Clubs' Motion seeks to dismiss only a subset of those claims.[1] As demonstrated below, the SAC adequately pleads those claims such that the Motion should be denied.

[1] Attached as **Exhibit 1** is a chart showing the claims each Plaintiff has brought against each Defendant and those claims the Clubs seek to dismiss. The Clubs do not seek to dismiss those intentional misrepresentation and concealment claims that the Court found adequate in its

A. The Standard of Review

"Pleadings must be construed so as to do justice," Fed. R. Civ. P. 8(e), and not in a manner that "exalts form over substance," *Phillips v. Girdich*, 408 F.3d 124, 128 (2d Cir. 2005).[2] From those principles flows the fundamental rule, which the Clubs ignore, that the complaint must be read as a whole. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) ("[T]he complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible."); *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 14 (1st Cir. 2011) ("The question confronting a court on a motion to dismiss is whether ***all*** the facts alleged, when viewed in the light most favorable to the plaintiffs, render the plaintiff's entitlement to relief plausible."); *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 285 (D.C. Cir. 2009) (factual allegations should be "[v]iewed in their totality"); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1253 n.11 (11th Cir. 2005) ("[T]he placement of the paragraph in another count is unimportant.... We read the complaint as a whole.").

Equally important, allegations like the SAC's that do "not simply recite the elements of a cause of action, but…contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively" are "entitled to the presumption of truth." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). On a Rule 12(b)(6) motion, "a court must accept as true all material allegations in the complaint as well as all reasonable inferences to be drawn from them." *Trendy Continue, Inc. v. Your Runway*, 2014 WL 3810210, at *1 (C.D. Ca. July 31, 2014). Similarly, "[t]he complaint must be read in the light most favorable to the nonmoving party." *Id.*, 2014 WL 3810210, at * 1.

The Clubs fundamentally ignore the rule that a plaintiff's claims may not be dismissed if they are sufficiently factually pleaded "to raise a reasonable expectation that discovery will reveal

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February 3 Order and concede that one additional claim, Robert Massey's against the New Orleans Saints, is also adequately pled, *see* Motion at 2, 5 n. 3.

[2] Unless otherwise indicated, all internal citations are omitted and all emphasis is added.

evidence" supporting those claims. *Starr*, 652 F.3d at 1214. The Motion just wishes away the reality that discovery has already produced abundant evidence supporting Plaintiffs' claims. Indeed, every named plaintiff testified that he did not receive crucial information about the Medications[3] he was given. The Buffalo Bills' longtime head trainer admitted that was true for numerous Bills players.

The Clubs also ignore the rule that even if they advance a plausible "no-liability" interpretation of the pleaded facts – and the Clubs get nowhere close to such an interpretation – Plaintiffs' claims survive. *See Starr*, 652 F.3d at 1215 (if plaintiff's and defendant's interpretations of the facts are plausible, plaintiff's claims survive because "[t]he standard at this stage of the litigation is not that plaintiff's explanation must be true or even probable" but need only plausibly suggest entitlement to relief). Further, the Clubs fail to acknowledge the well accepted "general rule that allegations of fraud based on information and belief do not satisfy Rule 9(b) may be relaxed with respect to matters within the opposing party's knowledge" because in "such situations, plaintiffs cannot be expected to have personal knowledge of the relevant facts." *Neubronner v. Miliken*, 6 F.3d 666, 672 (9th Cir. 1993).

"For all of these reasons, it is only under extraordinary circumstances that dismissal is proper under Rule 12(b)(6)." *Trendy*, 2014 WL 3810210, at *2 (citing *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981)); *see also Kamath v. Robert Bosch LLC*, 2014 WL 2916570, at * 3 (C.D. Cal. June 26, 2014).

B. <u>Plaintiffs Have Adequately Pled Their Concealment Claims</u>.

In their Motion, the Clubs do not address the pleading standards applicable to whether plaintiffs have adequately pled a separate concealment claim. Doing so here, as necessary, Plaintiffs demonstrate that those claims should not be dismissed.

[3] This term shall have the same meaning as set forth in the SAC.

1. The Standard for Pleading a Concealment Claim is Less Exacting Then for the Typical Fraud Claim.

While the February 3 Order, which found Rule 9(b) applicable to all of Plaintiffs' claims and identified a theory by which certain allegations were found to be adequately pled, applies to Plaintiffs' intentional misrepresentation claims and can apply to concealment, it does not govern the latter. As an initial matter, the facts, theories and claims of the SAC control and dictate the required analysis. *See, e.g., Davis v. TXO Prod. Corp.*, 929 F. 2d 1515, 1517 (10th Cir. 1991) (the amended complaint supersedes original complaint and renders it of no legal effect); *see also* 6 C. Wright, A. Miller, M. Kane, Federal Practice and Procedure §1476 (2d ed. 1990) "[o]nce an amended complaint is interposed, the original pleading no longer performs any function in the case")). And Plaintiffs' concealment claims are fundamentally predicated on the theory that the Clubs' failed to disclose material facts and concealed their scheme. Further, contrary to the Clubs' contention, Rule 9(b) does not apply in its full force to Plaintiffs' concealment claims, which are subject to a more relaxed pleading standard. *See In re Anthem, Inc. Data Breach Litig.*, 2016 WL 3029783, at *35 (N.D. Cal. May 27, 2016); *Todd v. XOOM Energy Maryland, LLC*, 2017 WL 667198, at *6 (D. Md. Feb. 16, 2017).

Critically, the Clubs fail to address the actual elements of a concealment claim, which in California and Maryland are the same: (1) a duty to disclose; (2) failure to do so; (3) intent to deceive/defraud/induce reliance; (4) justifiable reliance, and (5) resulting damages. *Compare Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 538 (D. Md. 2011) and *Green v. H&R Block, Inc.*, 355 Md. 488, 525 (1999) *with Falk v. General Motors Corp.*, 496 F. Supp. 2d 1088, 1099 (N.D. Cal. 2007) (Alsup, J.) and *Boschma v. Home Loan Ctr., Inc.*, 198 Cal. App. 4th 230, 248 (2011).

2. The Following Claims Satisfy the Foregoing Standard.

When considering the relaxed pleading standard applicable to these claims, Plaintiffs have adequately pled that the Clubs concealed materials facts relating to the Medications, *e.g.*, SAC ¶¶ 246 – 77, and the illegality of their scheme, *id.* ¶¶ 278 – 83, as exemplified below;

- **Duty**: the Clubs fail to argue that Plaintiffs have adequately pled this element and, in any event, paragraphs 170 – 183 and 246 – 77, among others, more than adequately identify the duties that the Clubs owe the players;
- **Failure to Disclose**: paragraphs 246 – 83, coupled with Exhibit A to the SAC, identify who on the Clubs failed to disclose material facts, whether the failure occurred in conjunction with something written or was simply oral, what facts they failed to disclose, and when and where those failures occurred and, coupled with the facts pled at paragraphs 170 – 183, 271 and 356 of the SAC, identify how the omissions were misleading;
- **Knowledge/Intent**: Rule 9(b) provides that these elements "may be alleged generally" and Plaintiffs have adequately done so. SAC, ¶¶ 346, 347.
- **Reliance**: both California and Maryland courts agree that reliance "can be prove[n] in a fraudulent omission case by establishing that had the omitted information been disclosed, the plaintiff would have been aware of it and behaved differently." *In re Anthem*, 2016 WL 3029783, at *35; *Doll*, 814 F. Supp. 2d at 539. Plaintiffs adequately alleged as much at paragraphs 271 and 356 of the SAC. In any event, like in *Falk*, "justifiable reliance … is easily satisfied" as no reasonable person would ingest Medications in the volume and frequency pled if they were told that doing so could lead to the long-term negative medical problems that the Plaintiffs currently suffer from, 496 F. Supp. 2d at 1099; and

- **Resulting Damages**: With regard to resulting damages, Plaintiffs have pled the following as to each named Plaintiff:

Darryl Ashmore,[4] "on September 17, 1995 … ruptured a disc in his neck (which later turned into a career-ending neck injury) but was kept on the field for that game, and for the remainder of the seasons, through Medications given to him by the Rams" medical staff and that he now suffers, *inter alia*, "constant pain in his neck." SAC ¶ 262.

Alphonso Carreker was regularly provided with "enormous quantities" of anti-inflammatory drugs by Green Bay Packers and Denver Broncos staff and in 2013 underwent heart surgery to drain inflammation from an infection around his heart after anti-inflammatory drugs proved "ineffective due to the resistance he had built up to such drugs … during his playing career." SAC ¶¶ 255, 257.

Charles Evans "was in pain in all the areas where he had suffered major injuries while playing, such as his wrist, knees, ankles and triceps" and, while with both the Ravens and Vikings, "avoided surgery and instead took pain pills and Toradol injections, which were readily provided to him [by the Clubs]," "to stay on the field [because he was] worried every 'single day' he played in the NFL about being cut." SAC ¶¶ 248, 264.

Chris Goode, while with the Indianapolis Colts, consumed "enormous quantities of … Vicodin … and Percocet," opioids which have "been tied to … decreased kidney function," and in 2015 was diagnosed with renal cancer despite no family history of kidney problems. SAC ¶¶ 202, 259.

Jeff Graham, while playing for the San Diego Chargers in 2000, played all but "one or two games" with a broken transverse process while managing the pain with medications

[4] For each Plaintiff, the SAC identifies all damages they have suffered as a result of all the Medications given them by the Clubs. Given page limitations, what follows are examples.

from Club medical staff and now lives in "constant pain." SAC ¶¶ 272.

Duriel Harris, while playing for the Miami Dolphins, hurt his ankle, was pressured to play by his coaches, did so with the help of medications, and now suffers from "constant pain" in his ankles. SAC ¶¶ 263.

Cedric Killings, while playing for the Minnesota Vikings, sprained his ankle, was then told by his head coach that he would be released if he didn't play, and so took medications and now has constant pain in his ankles. SAC ¶¶ 264.

Eric King, while with the Buffalo Bills, injured his back, was forced back into the game, hurt his back again, was given controlled substances to deal with the injury, and now suffers from constant pain, including in his back. SAC ¶¶ 249.

Steve Lofton, while with the Arizona Cardinals, "consumed large quantities of pain-numbing … medications" provided to him "to practice and play through pain," which he did, and he now "lives with intense pain every day" including in his "back, neck, shoulders, elbows, wrists, hands, and hips." SAC ¶¶ 246.

Robert Massey was injected with Toradol before one game for a hurt ankle, received Indocin before the next game after his head coach told him they don't pay him to miss games, and now lives in constant pain from his ankles. SAC ¶¶ 256.

Troy Sadowski, while with the Cincinnati Bengals, "received Toradol shots before every game" from his trainer Rob Recker, who "provided no warnings or mention of side effects," and for the sole purpose of enabling him to practice and play through pain, and now attributes the medications he received to his current injuries, including "constant pain in his back, hips, knees, ankles and shoulders." SAC ¶¶ 252, 247.

Reggie Walker, while with the San Diego Chargers, sprained his ankle, was then given Toradol for every game, and now experiences pain in his ankles. SAC ¶¶ 272.

Jerry Wunsch, while with the Seattle Seahawks, could not play but was pressured to do so by his head coach, Mike Holmgren, who had a trainer, Sam Ramsden, provide him with a massive amount of opioid Medications, and Wunsch played and now suffers from constant joint and nerve pain. SAC ¶¶ 274.

In sum, applying the relaxed, applicable pleading standard, and in light of the guidance this Court has already provided as to what qualifies for an adequately pled concealment claim, *see* Section C, *infra*, the foregoing demonstrates that Plaintiffs have adequately pled their concealment claims against the Clubs and such claims should not be dismissed.

C. Plaintiffs Have Adequately Pled Their Intentional Misrepresentation Claims.

The Clubs contend that the SAC should be judged against the pleading standard identified by the Court in its February 3 Order. Motion at 2 – 3. But the Court identified a "theory underlying [Plaintiffs'] intentional misrepresentation and concealment claims," not a standard. Order at 11. That said, the Court proceeded with its analysis of that theory and, in doing so, arguably articulated a pleading standard applicable here. *Id.* at 12 – 17. And while Plaintiffs disagree that standard applies to their separate concealment claims, *see* discussion *supra*, they do agree the theory identified by the Court in its February 3 Order is the only one applicable to their affirmative intentional misrepresentation claims. But it, and the corresponding pleading standard, is far more nuanced then Defendants credit.

1. The Standard Identified in the Order Applies Here.

At the outset, the Clubs question whether "this theory is still available to plaintiffs" because the SAC omits certain allegations that the Court "emphasized in the February 3 Order" that had been set forth in paragraphs 105 – 108 of the First Amended Complaint ("FAC"). Motion at 3 n.1. As demonstrated below, it is.

The allegations in paragraphs 105 – 108 of the FAC are not the allegations the Court found relevant in its analysis, which begins not at page 2 of its Order, as the Clubs contend, but at page 12, continuing to page 13. There, the Court identified five sets of allegations that show "the clubs

represented they cared about and prioritized players' health and safety but, in various ways, drove players to return to play at the cost of their health and safety." Order at 12. The Court also identified five additional sets of allegations that "indicate (1) the thirty-two clubs represented that they care about and prioritize players' health and safety, and (2) plaintiffs believed such representations." *Id.* at 12 – 13. All of those allegations remain in the SAC.[5] In sum, the allegations identified at pages 12, and 13 of the Order remain in the SAC and thus, "this theory is still available to plaintiffs."

From a plain reading of the Order, to plead an intentional misrepresentation claim, a plaintiff must allege: (1) that a Club "represented that they cared about and prioritize[d] players' health and safety," (2) "plaintiffs believed such representations," and (3) a Club "acted contrary to their representations by driving players to return to play at the cost of their health and safety." *See* Order at 13, 14. As discussed *supra*, the allegations previously found sufficiently pled by the Court for elements (1) and (2) remain in the SAC, and thus the only remaining issue is whether the SAC adequately pleads allegations to satisfy element (3).

The Clubs contend that the allegations previously found to pass muster for element (3) did so because they contained "specific facts alleging that on a specific occasion, an identified member of a club's staff had acted in a manner contrary to the health of a plaintiff … and that the player had suffered additional injury as a result of this premature return to play." Motion at 3. The Clubs further contend that the "only individual allegation found to pass muster with a different fact pattern was plaintiff Carreker's allegation that two clubs had given him such a large quantity of anti-inflammatory drugs that he built up a resistance to those drugs that, in turn, impeded his ability to use them in treating a heart condition." *Id.* at 3 – 4.

[5] Attached hereto as **Exhibit 2** is a chart showing where certain allegations from the FAC can be found in the SAC.

Plaintiffs generally agree that the allegations that passed muster, save Carreker's, contained specific facts identifying Club staff acting in a manner contrary to a player's health and that the player suffered harm as a result. That reading, however, runs roughshod over several important subtleties in the Court's analysis.

First, while the FAC identified coaches, doctors, and trainers by name, the Order does not require that they do. For example, the allegations against the Lions pled only that Club trainers and doctors, without identifying the same by name, gave Mr. Massey the medications at issue. FAC at 226 – 27. Similarly, the allegations against the Dolphins spoke only to an unnamed trainer and doctor. *Id.* at 255 – 56. And while the foregoing allegations did identify by name coaches that pressured Plaintiffs to play, the allegations against the Broncos, Packers and Chargers identified only unnamed trainers and doctors. Thus, it is clear that an allegation need ***not*** identify by name a person to be found adequately pled so long as it gives the Club a sufficient indication as to who allegedly made the misrepresentations. Indeed, had the Clubs complied with the Federal drug laws, they should be able to easily ascertain the precise individual or individuals who provided Medications to each player. Moreover, the Clubs clearly know who their team doctors and trainers were when each Plaintiff played for a Club.

Second, the Order distinguishes between allegations that adequately pled what injuries were suffered, Order at 14 – 16, and the allegations regarding Plaintiff King, which failed "to specify what injuries [he] sustained," *id.* at 17. Reviewing the former, many of those allegations tied the administration of Medication for an injury suffered in the NFL to a specific injury the plaintiff is currently suffering from (*e.g.*, Massey hurt his ankle against the Falcons, received a shot in his ankle during that game and before the next game against the Vikings, and now suffers from ankle pain). Others, however, do not do so, and instead identified only a specific pain from which the plaintiff is currently suffering (*e.g.*, Wunsch now suffers joint and nerve pain and

Graham lives in constant pain). Thus, an allegation need only identify a specific injury the plaintiff is currently suffering from to suffice.

Third, while the FAC identified specific dates when certain events occurred, the Order focuses only on the year and not the month or day. For example, the adequately pled allegations against the Lions spoke to events that took place on September 4, 1994, but the Order focuses only on the year 1994 and not the specific date of September 4. Order at 14. Indeed, the Carreker allegations found adequately pled do not include days, months, or years, but rather simply address his time spent with the Broncos and Packers. *See* FAC at 255. Thus, it should not be necessary to plead the exact date, month, or year that something transpired to adequately plead a claim so long as a Club can identify that the "something," like the Medications given to Carreker, happened on their watch.

2. The Following Claims Satisfy the Foregoing Standard.

Applying the theory identified in the Court's February 3 Order in light of the applicable pleading standard as set forth immediately above, the following intentional misrepresentation claims are pled in the SAC with the requisite particularity: Ashmore/Los Angeles Rams; Ashmore/Washington; Graham/Chicago; Graham/New York Jets; Graham/Philadelphia; Harris/Cleveland; King/Buffalo; King/Detroit; King/Tennessee; and Sadowski/Cincinnati. The Court should therefore not dismiss these claims.

II. SUMMARY JUDGMENT IS NOT WARRANTED FOR THE CLUBS' LIMITATIONS DEFENSE.

Defendants contend that the majority of Plaintiffs' claims accrued prior to May 2012 and are therefore time-barred. However, Defendants have failed to meet their burden to demonstrate the absence of material facts as to when Plaintiffs knew or should have known both of the nature of their latent injuries and that they were caused by Defendants' wrongful conduct. In addition, even if the claims had accrued, given Defendants' concealment of their illegality, those claims still

are not time-barred. Moreover, as many analogous cases teach, what Plaintiffs reasonably should have known, and when they should have known it, are questions for the jury, especially given the nature of Plaintiffs' injuries and Defendants' concealment of their wrongdoing. Accordingly, Defendants' summary judgment motion should be denied.

A. Summary Judgment Standard.

The Maryland Court of Appeals has confirmed that "ordinary principles governing summary judgment . . . continue to apply when the issue on summary judgment is limitations. . . ." *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App. 698, 710 (2002). Thus, "only when there is no genuine dispute of material fact as to when the action accrued, should a trial court grant summary judgment on the basis of limitations; otherwise, the question is one of fact for the trier of fact." *Id.* at 710-11. In determining whether a factual dispute exists, the Court must "view the evidence in the light most favorable to . . . the nonmovant, and draw all reasonable inferences in her favor without weighing the evidence or assessing the witness' credibility." *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 644-45 (4th Cir. 2002). However, "[e]ven where the underlying facts are undisputed, if the undisputed facts are susceptible of more than one permissible factual inference, the choice between those inferences should not be made as a matter of law, and summary judgment should not be granted." *Heat & Power Corp. v. Air Products & Chemicals, Inc.*, 320 Md. 584, 591 (1989).

Here, the question of accrual focuses on what Plaintiffs knew about their injuries prior to May 2012. "In this regard, a determination must be made as to whether a reasonable person would have been put on notice, which necessarily involves the 'assessment of the creditability or believability of the evidence.'" *Supik*, 152 Md. App. at 712. To this end, the Maryland Court of Appeals has stated:

> whether or not the plaintiff's failure to discover his cause of action was due to failure on his part to use due diligence, or to the fact that defendant so concealed

> the wrong that plaintiff was unable to discover it by the exercise of due diligence, is ordinarily a question of fact for the jury.

Frederick Rd. Ltd. Pshp. v. Brown & Sturm, 360 Md. 76, 96 (2000); *see also Doe v. Archdiocese of Wash.*, 114 Md. App. 169 (1997); *Young v. Swirsky*, 2015 U.S. Dist. LEXIS 144671, at *19 (D. Md. Oct. 26, 2015). The burden which Defendants assumed in their motion is to show that there is no dispute of any fact that Plaintiffs' causes of action accrued prior to May 2012. The case law makes clear that, to meet that burden, Defendants would have to demonstrate that undisputed facts prove that, by May 2012, Plaintiffs not only knew of their injuries, but that their injuries were caused by the Medications. Defendants cannot meet this burden.

B. Accrual of Plaintiffs' Claims Under Maryland Law.

The parties agree that the appropriate limitations period for Plaintiffs' claims is three years from the date they accrued.[6] The parties also agree that the discovery rule applies to determine when Plaintiffs' causes of action accrued. Finally, the parties agree that under the discovery rule a cause of action only accrues when a plaintiff knows, or reasonably should have known, of the wrong for which recovery is sought.. The parties disagree, however, about what it means to have knowledge of the wrong for purposes of accrual.

Defendants contend that a cause of action accrues when a plaintiff is on notice that he has suffered an injury. So, Defendants assert, Plaintiffs' causes accrued when they knew, or should have known, of their injuries. This contention misstates the law. Under Maryland law, "for the statute of limitations to run, [p]laintiffs 'must be aware that a tort has occurred and not merely that an injury has occurred." *McKenney v. United Bank*, 2010 U.S. Dist. LEXIS 125528, at *7 (D. Md. Nov. 29, 2010) (quoting *Pennwalt Corp. v. Nasios*, 314 Md. 433, 441 (1998)).

[6] Though conceding that Section 5-101 governs, Defendants argue that a purported five-year statute of repose contained in Section 5-109(a)(1) may also bar Plaintiffs' claims. Mot. at 15. In 2012, the Court of Appeals made clear that Section 5-109(a)(1) is a statute of limitations subject to Maryland's discovery rule. *See Anderson v. United States*, 427 Md. 99, 127 (2011).

Tracing the expansion of the discovery rule, *Pennwalt* then "reiterate[ed] our test for determining when a cause of action accrues – when the plaintiff knew or reasonably should have known of the nature and cause of the harm" – not just the fact of injury, as the Clubs erroneously posit. *Pennwalt*, 314 Md. at 444. "An action accrues when the 'nature and cause of the injury,' and not just when the nature of the injury, are known or should have been known." *McKenney*, 2010 U.S. Dist. LEXIS 125528, at * 7; *see also Miller v. Pac. Shore Funding*, 287 B.R. 47, 50 (D. Md. 2002). The Clubs ignore the legally dispositive consideration that the discovery rule contemplates more than just knowledge of an injury – plaintiff must have knowledge that the injury complained of was the result of a wrong against him. *See Hecht v. Resolution Trust Corp.*, 333 Md. 324 (1994) (cause of action "accrues" when "the plaintiff knows or should know of the injury, its probable cause, and . . . [the defendant's] wrongdoing . . ."). [7]

This standard does not require actual knowledge on the part of the plaintiff; it may be satisfied if the plaintiff is on "inquiry notice." Inquiry notice is "having knowledge of circumstances that would cause a reasonable person in the plaintiff's position to undertake an investigation which, if pursued with due diligence, would have led to knowledge of the alleged

[7] Though Defendants previously recognized that the rules for applying the statute of limitations in the RICO context are different from those applicable to common-law claims, Defendants seem to abandon this distinction and urge this Court to adopt its rulings related to the accrual of Plaintiffs' RICO claim to find Plaintiffs' state law claims time-barred. However, as noted by Defendants, "the Supreme Court has held that the limitations period [for a RICO claim] begins to run as soon as a plaintiff knows of his injury, regardless of whether he knows that the injury was caused by a RICO violation." Dkt. 139 at 7. Moreover, "[o]nce a plaintiff knows of his injury," a cause of action for a RICO violation beings to accrue, "even if it is difficult to ascertain the cause of the injury due to circumstances such as fraud." *Id.* at 7. Thus, as Defendants argued, the "dispositive fact for statute of limitations purposes" for Plaintiffs' RICO claim was when Plaintiffs knew their professional football careers ended. *Id.* This is not, however, dispositive where, as here, knowledge of both the injury and its cause is required for accrual of the claim. Moreover, because the conduct giving rise to the injuries here, and the injuries themselves, are manifestly different, Defendants are simply incorrect in citing to the facts underlying Plaintiffs' RICO claim, and stating that "[t]he only remaining question regarding accrual is therefore whether plaintiffs were on notice before May 2012 that they had suffered an injury." Mot. at 16.

[tort]." *McKenney*, 2010 U.S. Dist. LEXIS 125528, at *6. However, what triggers inquiry notice requires careful examination of the factual context.

Where, as here, "'the plaintiff is unqualified'" to understand and investigate the possible cause of the injury, inquiry notice is not triggered. *See Pennwalt*, 314 Md. at 439. Where, as here, a plaintiff did not suspect the Clubs of wrongdoing and trusted the Clubs' medical personnel not to harm them, inquiry notice is not triggered.[8] *See, e.g., Pennwalt*, 314 Md. at 451-52 (discussing *Baysinger v. Schmid Prods. Co.*, 307 Md. 361, 367-68 (1986)). *See also Harig v. Johns-Manville Prod. Corp.*, 285 Md. 70, 79, n. 3 (1978) (discussing "discovery of the wrong" inquiry notice in professional malpractice context, noting "the relation of trust" and "reliance on professional expertise" factors mitigating against inquiry notice). Where, as here, "a reasonable person would not investigate or continue to investigate, then the second prong of the inquiry, i.e., whether a reasonably diligent investigation would have led to the discovery of the wrong, is not even considered." *Pennwalt*, 314 Md. at 451-52, 550 A. 2d at 1165.m). Where, as here, a plaintiff may reasonably have attributed symptoms to other causes - such as aging and continuing pain from on-field injuries - inquiry notice is not triggered. *See De La Paz v. Bayer Healthcare LLC*, 159 F. Supp. 3d 1085, 1100 (N.D. Cal. 2016) (Alsup, J.) (noting accrual is generally fact question unless evidence supports only one reasonable conclusion and finding plaintiff could reasonably have attributed symptoms to "some other cause"). Nor is inquiry notice triggered when the defendant behaved deceitfully: "fraud may prevent the acquisition of knowledge sufficient to constitute

[8] *See also Brown v. United States*, 353 F. 2d 578, 580 (9th Cir. 1965) ("[O]ne is presumed to repose confidence in the individual doctor to whom he entrusts his medical problems and that the confidential relationship excuses the making of inquiry which questions the care which has been or is being given during the existence of the relationship."); *see also* Tr. of Deposition of Alphonso Carreker at 310/14-21 ("I -- I would have -- I thought that if someone was giving me something and they -- And I'm totally trusting in them, they're doing their job to take care of me. You get what I'm saying? … Like I said, we were friends.")

inquiry notice or prevent the acquisition of additional information if inquiry is made." *Edwards v. Demedis*, 118 Md. App. 541, 566 (1997).

In sum, here the plaintiffs' testimony not only corroborates the Amended Complaint's allegations that all the teams wrongly administered enormous amounts of Medications to keep players on the field, but also demonstrates another key reason plaintiffs were not on inquiry notice. The conduct was constant and ubiquitous. The utter sameness of the Clubs behavior told plaintiffs that this was normal, standard practice.

Defendants cite few cases in arguing that summary judgment is warranted, and what little they do cite is of marginal relevance to the instant case.[9] Many cases demonstrate that at worst for plaintiffs the accrual question is one for a jury. *See, e.g., Young v. Medlantic Lab P'ship*, 125 Md. App. 299. For example, in *Wagner v. Allied Che. Corp.*, 623 F. Supp. 1407 (D. Md. 1985), the court, applying Maryland law, denied defendants' motions for partial summary judgment in part and stated:

> Plaintiffs were definitely 'put upon inquiry' about a possible causal connection between their illnesses and the chemical exposure when they consulted attorneys or medical experts who expressly told them of the possible relationship. . . . ***Prior consultations with medical experts not only failed to reveal a causal connection***, but also alleviated some plaintiffs' suspicions of a causal connection when, according to some testimony, doctors employed by Allied specifically advised that the disabilities were unrelated to the chemicals. Additionally, plaintiffs had no medical expertise upon which to base their own conclusions about a causal relationship. Thus, certain plaintiffs were not put upon inquiry by express knowledge of the wrong until a time within three years of filing of their claims.

[9] *Archdiocese of Wash.*, 114 Md. App. 169, involved sexual child abuse, where the court noted that, in a case of battery, the harm "occurs at the time of the battery, regardless of whether the victim is aware that the act is wrong or of the full extent of the harm." *Id.* at 186. Thus, there was no dispute when the plaintiff knew of the wrongful conduct underlying his claim. *Hahn v. Claybrook*, 130 Md. 179 (1917) was decided before the discovery rule was fully developed and followed the then-general rule in Maryland that an action accrued on the date of the wrong. *See Pennwalt Corp. v. Nasios*, 314 Md. 433 (1988) (recognizing that "the date of the wrong rule did not provide equitable results in all cases); *Waldman v. Rohrbaugh*, 241 Md. 137 (1966) (identifying discovery rule as an exception to the general rule). *S. Md. Oil Co. v. Texas Co.*, 203 F. Supp. 449 (D. Md. 1962) involved a claim for indemnity, which the court noted was "to be decided by that line of decisions which acknowledges that an action for indemnification … does not accrue until payment is made." *Id.* at 452. The Defendants' remaining cases merely state general principles of claim accrual under Maryland law.

Id. at 1409-10.

In *Wagner*, the plaintiffs' injuries were allegedly caused by exposure to certain chemicals. *Id.* Not unlike the instant case, the *Wagner* plaintiffs' injuries appeared gradually over time and were of a type not clearly related to the alleged cause. *Id.* The court emphasized – like the Plaintiffs do here – that plaintiffs alleged their injuries manifested primarily after their employment (and exposure) was terminated, "making it less likely that they should immediately suspect a causal connection." *Id.* at 1409. Even where the injuries were apparent during their employment, the court held plaintiffs had no way of knowing that there may be a causal connection due to the nature of their injuries. *Id.* The same is true with respect to certain of Plaintiffs' injuries that may have manifested themselves prior to when their NFL careers ended.

Another exemplary case is *Baysinger v. Schmid Prod. Co.*, 307 Md. 361 (1986), in which the plaintiff had an intrauterine contraceptive device inserted in May 1979, which was later removed in November when the plaintiff began to experience lower abdominal pains. Approximately one month later, the plaintiff was hospitalized with a serious ailment, and she questioned her treating physician and his associate as to whether the device had caused her illness. *Id.* at 362. The plaintiff was advised that there could be several possible causes and, although intrauterine devices had been associated with pelvic infections in medical literature, there was no way of determining whether her infection was caused by the device. *Id.*

Four years later, in January 1983, the plaintiff received notice of possible causation through an advertisement in a local newspaper. *Id.* at 364. At that time, the plaintiff retained counsel and filed suit. *Id.* The defendant filed a motion for summary judgment arguing that the statute of limitations had expired, which was granted by the trial court and affirmed by the Court of Special Appeals in an unreported opinion. *Id.* at 362. However, the Court of Appeals reversed holding that the determination of whether the plaintiff had sufficient knowledge of circumstances prior to

January 1980 such that a reasonable person would have undertaken an investigation was a disputed issue of fact. The court reasoned:

> While the sparse record of facts before the trial judge demonstrated that Mrs. Baysinger's suspicions concerning the cause of her infection included the intrauterine device, it also showed that she initiated a preliminary investigation by discussing her suspicions with Dr. Cho, and that Dr. Cho told her he had "no way of determining whether her infection was caused by the Saf-T-Coil or by some other unrelated occurrence or instrumentality." The record further discloses that at that time Dr. Gallaher had no idea of what caused her illness, and consequently further investigation by way of inquiry of Dr. Gallaher would have been fruitless. ***We further note that while the record indicates that Mrs. Baysinger entertained various suspicions concerning the cause of her illness, there is no evidence that she then suspected, or reasonably should have suspected, wrongdoing on the part of anyone.***

Id. at 367-68; *see also Degroft v. Lancaster Silo Co.*, 72 Md. App. 154 (1986).

On the other hand, *Lutheran Hosp. of Md. v. Levy*, 60 Md. App. 227 (1984), in which the court found no disputed issues of fact that the plaintiff was on inquiry notice, illustrates by contrast how different our case is.. In *Lutheran*, the plaintiff broke her ankle and had it put in a cast at Lutheran Hospital in October 1973. Shortly thereafter, a physician at the hospital told her to throw away her crutches and walk on the ankle. *Id.* at 233. The plaintiff, however, had continuing trouble with the ankle and consulted a physician at Mercy Hospital in April 1974, who advised the plaintiff that her ankle "was all messed up" and asked her "who the hell told her to walk on that ankle?" *Id.* She was also advised that the condition of her ankle would not improve. *Id.*

Notwithstanding this information, the plaintiff did not consult an attorney until early 1975. *Id.* at 234. Not until July 1977 did the plaintiff's treating physician examine the x-rays and conclude that she was the victim of medical malpractice. *Id.* Suit was filed in June 1978 and the jury returned a substantial verdict in her favor. *Id.* at 235. On the hospital's appeal, the court held that the statute began to run when, having seen the doctor at Mercy Hospital in April 1974, the plaintiff formed a belief that some wrong had occurred. *Id.* at 236; *see also Doe v. American Nat'l Red Cross*, 923 F. Supp. 753 (D. Md. 1996) (granting summary judgment finding that the plaintiff,

who was diagnosed with HIV five years after receiving a blood transfusion, but brought suit four years after that diagnosis, was put on inquiry notice as to the cause of her infection through communications with her counsel and the defendant, in addition to other sources, such as media coverage).

The circumstances of our case are much more akin to *Baysinger* and *DeGroft* than *Levy* and *Archdiocese of Wash*. Like the plaintiffs in *Baysinger* and *DeGroft*, Plaintiffs pursued a preliminary investigation by seeking medical treatment, and then relied on assurances in deciding not to investigate their claims further. In addition, Plaintiffs did not suffer latent injuries from the Medications in such close temporal proximity to Defendants' alleged improper conduct that plaintiffs could reasonably have immediately suspected wrongdoing. The facts of this case more strongly favor denial of summary judgment than those in *Baysinger* given that, here, there is no evidence that any of Defendants' doctors – or the Workers' Compensation or NFL disability doctors - ever told the Plaintiffs that the Medications could have had any relation to their later-in-life injuries,[10] and thus, Plaintiffs did not have any suspicions that the Medications could be the cause of any such injuries. Unlike in *Archdiocese of Wash.* and *Levy*, here there are no medical records, correspondence between Plaintiffs and Defendants (or any other individuals), or any other source, from which the Court could conclude, let alone definitively, that the Medications were brought to Plaintiffs' attention as a possible cause of their later-in-life injuries.

C. **The Injuries Underlying Plaintiffs' Claims.**

Plaintiffs' causes of action seek recovery for later-in-life injuries they sustained ***as a result of Defendants' misrepresentations and concealment in connection with the provision and administration of the dangerous Medications***. They are not seeking recovery for injuries they

[10] For the few Plaintiffs told by other medical professionals that the Medications caused their injuries, that occurred within three years preceding the filing of the instant lawsuit.

may have sustained as a result of any other cause. In other words, the injuries at issue in this case are not the injuries that Plaintiffs sustained on the field ***as a result of playing football***, and thus, are not the injuries that were at issue in Plaintiffs' workers compensation or disability claims.[11] The injuries for which Plaintiffs seek compensation fall into two discrete categories: (1) internal organ injuries; and (2) musculoskeletal injuries. See SAC, ¶¶ 357, 362. Both categories of injuries were latent injuries because they could not be detected at the time the wrong occurred (*i.e.*, Defendants' misrepresentations and concealment in connection with the provision and administration of the dangerous Medications), but rather manifested themselves at a later time. Even when the nature of their injuries were discovered as their bodies rapidly deteriorated, the ***cause*** of those injuries – the exorbitant amount of often illegally dispensed Medications – were not and could not have discovered in the exercise of reasonable diligence until shortly before Plaintiffs filed this lawsuit, after conferring with counsel.

D. Defendants Have Not Demonstrated the Absence of a Genuine Issue of Material Fact.

Defendants contend that "the vast majority of the claims asserted here accrued before May 2012 and are therefore time-barred." Mot. at 18. Implicit in the assertion is that Plaintiffs knew or should have known of their latent injuries ***and*** that Defendants' misrepresentations and concealment in connection with the provision and administration of the dangerous Medications had caused those injuries. Relying on Plaintiffs' deposition testimony, medical records, and workers' compensation and disability filings, Defendants claim to be entitled to summary

[11] *See, e.g.*, Carreker Dep Tr. 303/9-22 (differentiating between Workers' Compensation proceeding and instant case: "This is just totally different than what I was seeking for out here…We're trying to show that the volumes and the amount of prescription meds that I took repeatedly, daily, over years kept me on the field, kept me playing; and I wouldn't have been able to do that without them. It's a -- It's a total different deal.")

judgment on the following, albeit flawed, reasoning: before May 2012 most of Plaintiffs filed workers' compensation claims seeking recovery "for the same injuries at issue here," and all Plaintiffs have acknowledged that prior to May 2012 they experienced "pain in the same body parts about which they complain here." Mot. at 18.

Defendants' position is meritless and overly simplistic. Even a generous reading of the medical records and workers' compensation and disability filings do not establish the absence of a genuine issue of material fact as to what Plaintiffs knew or reasonably should have known with respect to the cause of the injuries at issue here. In fact, everything contained in the record establishes that the medical professionals treating Plaintiffs tied their musculoskeletal injuries to *on-field* incidents, and otherwise did *not* identify the Medications as a cause of their internal organ injuries. As Defendants have known for some time, use of the Medications, particularly in the amount and manner in which they were administered by Defendants, can cause a variety of serious health problems, both directly and indirectly. Plaintiffs' central allegation is that Defendants failed to advise Plaintiffs of that connection and the nature of the injuries the Medications could cause. That connection is clearly not identified in the factual record. Most of the Plaintiffs have still ***never*** been told by a doctor that the Medications could have caused their injuries.

As Defendants point out, Plaintiffs have alleged that the earliest Plaintiffs became aware that Defendants' conduct caused their injuries was March 2014. Mot. at 17. Plaintiffs' interrogatory responses stating that it was only in March 2014, after they began communicating with counsel, that they "first understood that the injuries about which [they] complain[] were caused by the NFL Member Clubs' conspiracy," supports that fact. Defendants' claim that the responses, instead, speak to when Plaintiffs contemplated the theory underlying their claims, and not obtained knowledge of the ***facts*** underlying their claims – simply misses the mark. Deposition testimony elicited from Plaintiffs clearly places Defendants' contention in dispute. In any case,

given that Plaintiffs' responses are susceptible to more than one permissible factual inference, "the choice between those inferences cannot be made as a matter of law, and summary judgment cannot be granted on that ground." *See Heat & Power Corp.*, 320 Md. at 591.

The instant contains an issue of material fact: When were Plaintiffs put on notice regarding the causal connection of their injuries? "Questions of fact on which a limitations defense will turn are to be decided by the jury or, when sitting as a jury, by the court." *O'Hara*, 305 Md. at 301. Defendants argue, in essence, that the statute of limitations began to run on Plaintiffs' claims regardless of whether they had any knowledge – either express or implied – of the causal connection between their musculoskeletal injuries and the Medications. Defendants maintain the same argument – albeit with even less record support – with respect to the later-in-life internal organ injuries. However, under Maryland law, to start the running of the statute of limitations, Plaintiffs must have knowledge that these injuries were caused by the Medications. Defendants offer no evidence that Plaintiffs had any knowledge of the relationship between the Medications and their injuries prior to March 2014. Rather, Defendants merely draw their own conclusion that Plaintiffs possessed or reasonably should have possessed this knowledge – even in the face of Defendants' concealment and continued denial of any causal connection.[12]

However, Plaintiffs did not have this knowledge, nor could they have been reasonably expected to inquire specifically about the relationship between the use of the Medications and their injuries. For each Plaintiff, the record establishes the following: (1) Plaintiffs' medical records

[12] The argument presents a Catch-22: Defendants claim that their doctors and trainers have done no wrong and only sought to help and heal Plaintiffs, yet simultaneously argue that Plaintiffs should not have trusted those same doctors and trainers, and initiated suit years earlier. Notwithstanding the paradox, Defendants' theory essentially imposes a standard of extraordinary diligence where only reasonable diligence is required. Moreover, requiring more from Plaintiffs would be inappropriate given the confidential nature of the doctor-patient relationship. *See Frederick Rd. Ltd. Pshp.*, 360 Md. at 99 (holding "the confiding party has no duty to make inquiries until something occurs to make him or her suspicious").

and workers compensation and disability filings contain ***no attribution of the cause*** of Plaintiffs' injuries to the Medications prior to May 2012; (2) there is no evidence that Plaintiffs' treating doctors told them of the role the Medications had in their injuries prior to May 2012; (3) there is no evidence that Plaintiffs acquired knowledge of the cause of their injuries from any other source prior to May 2012; (4) it would not be reasonable for Plaintiffs to investigate the cause of their injuries given the trust they had in their treating doctors and the assurances given; and (5) even if Plaintiffs did investigate, they would have been unable to obtain knowledge of the cause. As set forth below, issues of fact as to what Plaintiffs knew and when do exist.[13]

Ashmore: Ashmore has suffered from musculoskeletal injuries since he retired, which continue to worsen to this day at a rate far in excess of what he would have predicted. Ashmore Deposition ("Ashmore Depo.") at 307:21-309:3. This degeneration is exacerbated by overuse of the Medications. Ashmore also suffers from kidney damage, along with "heart issues" that are rapidly developing and in the process of medical evaluation. *Id.* at 229:4-229:18. Though he now believes that those kidney problems are related to the Medications taken while playing in the NFL, (*id.* at 186:21-188:5), no doctor has told him that these injuries are linked to taking those Medications. Answer to 3rd Set of Interrogatories at 13. Ashmore has consistently expressed the trust he placed in his NFL team doctors and trainers. Ashmore Depo. at 42:5-42:9; 74:11-74:15; 158:25-159:9. Despite Defendants' assertions to the contrary, Ashmore did not discover that he was harmed by Defendants' distribution of the Medications as part of a 2009 medical examination for a life insurance application, because the Medications were neither discussed in the application, nor in a follow-up appointment with a hospital. *Id*. at 182:14-182:19. Defendants' conclusion that

[13] Questions of fact also exist as to the accrual of a claim for medical monitoring. Given the injury in such a claim is, as set forth in *Exxon Mobile Corp. v. Albright*, 433 Md. 303, 378 (2013), "exposure itself and the concomitant need for medical testing," Plaintiffs must have known, or should have known, that they had a significantly increased risk of developing injuries as a result of the Medications. Factual disputes remain as to these issues.

elevated creatinine levels in a life insurance application time-bar the instant claims is supported only by a strained speculation, and not undisputed fact.

Wunsch: As an outright matter, Defendants seek to wish away many of Wunsch's claims in a footnote, stating that they are not pled with particularity and providing no support for that supposition, certainly not a set of undisputed facts that, when viewed in favor of Wunsch, compel such a conclusion. For example, Wunsch's pituitary condition was first diagnosed around 2012, (Wunsch Deposition at 220:7-221:12), and his Crohn's diagnosis was first linked to the Medications in a ***2014 conversation*** with his doctor. *Id.* at 235:25-236:10; 131:7-132.21; 122:19-126:21. Neither compels the conclusion that these claims are time-barred, but in fact prove the opposite. Additionally, Defendants attribute Wunsch's disability and workers' compensation claims as dispositive proof that the statute of limitations has expired. However, when asked if the disability claim had anything to do with the Medications, he stated plainly: "No, I had no idea. . . we thought that when I got done, I would be able to do a job. . . . I had dreams of having - I wanted to be a construction person and I couldn't do it." *Id.* at 332:16-333:2. He testified similarly for the workers' compensation claim. *Id.* at 334:23-335:2. Further, Wunsch has consistently expressed the trust he placed in his NFL team doctors and trainers, because they were supposed to be "the best of the best" and he never thought they had anything but my "best interest and long-term health in their minds. They took a Hippocratic Oath." *Id.* at 146:16-147:16; *see also id.* at 115:15-115:20; 190:20-191:12; 314:24-315:25; 317:14-318:3; 319:17-25. It was only years later that he gained an understanding of the causal connection between his injuries and the Medications. *Id.* at 118:10-119:21.

Killings: Like the other Plaintiffs, Killings has consistently expressed the trust he placed in his NFL team doctors and trainers, as any reasonable athlete would. Killings Deposition at 121:12-121:25; 192:8-193:7; 212:25-213:25; 271:3-271:13. This was compounded by the

pressure placed upon Killings by his employers – the Clubs – to comply with the instructions of Club employees, including the training and medical staff. *See, e.g., id.* at 141:10-141:19. Despite Defendants' assertions to the contrary, Killings did not suddenly discover that he was harmed by Defendants' harmful distribution of the Medications as part of a 2008 workers' compensation claim, because the Medications were never discussed in the claim, nor have any doctors diagnosed him with any medical condition directly connected to the Medications. *Id.* at 333:1-333:11. Though Defendants seek to conflate his injuries suffered while playing in the NFL with latent, hidden, later-in-life injuries sustained by the Medications, Killings has observed that his symptoms have worsened and episodic pain has become more frequent subsequent to the filing of his workers' compensation claim – a hallmark of the damage caused by the Medications. *Id.* at 349:5-351:25. He did not know that these injuries were caused by the Medications, and the link was only discovered in 2014. *Id.* at 24:6-24:23. The same is true with regard to the removal of his gall bladder, his recently diagnosed hypertension (*id.* at 346:18-347:10), and his newly emerging digestive difficulties and headaches. *Id.* at 29:8-32:16.

Massey: Massey currently suffers from both musculoskeletal and internal organ injuries as a result of the Medications he took while playing. Massey relied on his NFL team doctors and trainers to treat his injuries, to safely get him ready to play, and to determine when he could return to play following an injury. Massey Deposition ("Massey Depo.") at 109:17-110:22; 159:19-160:4; 160:21-161:3; 280:9-280:17. Though he did file workers' compensation claims involving various musculoskeletal injuries in 2011 and a disability benefits claim in 1999, he had no idea that those injuries may be related to, or were being exacerbated by, Defendants' Medication practices, and was, thus, not seeking compensation for injuries relating to Medications. *Id.* at. 308:17-309:2. Massey has developed new musculoskeletal injuries since filing these claims, and his injuries also rapidly worsen to this day, at a rate far in excess of what he would have predicted,

which is likely caused by the Medications. *Id.* at 253:17-255:14; 324:3-325:13. It was only after discussing his injuries and playing experiences with counsel, did Massey realize that he had been harmed by Defendants through their provision of the Medications. Answer to 3rd Set of Interrogatories at 16. Lastly, Defendants make only passing reference to the fact that Massey was told, about a year ago, by a doctor that he had suffered kidney damage as a likely result of the Medications (Massey Depo. at 115:3-115:19; 261:2-261:23) and do not mention that Massey recently had a heart attack – or suspected heart attack – in late 2015 or early 2016. *Id.* at 258:16-259:5.

Evans. Defendants' simplistic analysis of Evans' claims highlights the flaws in their statute of limitations analysis. They reason that, because Charles Evans died in 2008, Ms. Evans ***must*** have known that he died of heart failure at age 41 due to the allegedly tortious conduct of Defendants, and that his death was caused by the Medications. However, the record makes clear that neither Ms. Evans, nor her late husband, had any idea that the Medications provided by Defendants were causing him injury while he was alive, nor that they were related to his death in 2008. [14] Evans Deposition at 149:9-149:17. Nor did they have any reason to think otherwise – both Ms. Evans and Charles Evans trusted the NFL team doctors and trainers to provide appropriate medical care. *Id.* at 69:2-69:8; 103:4-103:6; 104:1-104:24. It was only after meeting and discussing Charles Evans' conditions with counsel in 2014 that Ms. Evans was aware that the Medications provided by Defendants harmed Charles Evans. *Id.* at 155:24-158:23.

King: King currently suffers from both musculoskeletal and internal organ injuries as a result of the Medications he took while playing. King relied on his NFL team doctors and trainers

[14]The argument that Charles Evans' death is dispositive proof that inquiry notice had been triggered ignores the fact that his injuries were never traced back to the Medications. Regardless, "when the decedent does not know of the cause of his injury before death, the cause of action does not accrue until the personal representative, standing in the shoes of the decedent, is on inquiry notice." *Benjamin v. Union Carbide Corp.*, 162 Md. App. 173, 203 (2005).

to treat his injuries, to safely get him ready to play, and to determine when he could return to play following an injury. King Deposition at 69:3-69:19; 96:8-96:14; 101:17-101:24; 105:16-105:23; 134:5-134:18; 145:1-145:15; 202:2-202:9; 245:10-246:2. Though he did file workers' compensation claims involving various musculoskeletal injuries in 2011 and 2012, he had no idea that those injuries may be related to, or being exacerbated by, Defendants' Medication practices. *Id.* at 330:13-331:10; 335:12-335:25; 380:15-382:13. It was only after the *Dent* case gained media attention, along with discussions related to *Dent*, that King realized that he had been harmed by Defendants. *Id.* at 279:22-282:4. Lastly, Defendants make no mention of the fact that King was hospitalized with liver or kidney problems in 2016. *Id.* at 364:1-365:6.

Harris: Harris currently suffers from both musculoskeletal and internal organ injuries as a result of the Medications he took while playing. Harris relied on his NFL team doctors and trainers to treat his injuries, to safely get him ready to play, and to determine when he could return to play following an injury. Harris Deposition at 276:9-16; 140:14-24; 138:24-139:5; 144:7-21; 212:8-14. Harris trusted the team doctors "to keep [him] healthy and to protect [him]" and did not feel any reason to doubt the treatment they administered. *Id.* at 129:1-19. Though he felt "perfect" when he first left the NFL (*id.* at 280:22-281:9), he now suffers from back pain and other ailments, which he now connects to the Medications and to playing while injured. *See, e.g., id.* at 209:7-212:17. Harris also now suffers from internal problems with his liver, heart, and kidneys, as well as arthritis, fatigue, joint swelling and concentration problems, which his current doctors have explained are common side effects of the medication he took while playing (*id.* at 192:6-194:4). Defendants aver in a footnote that Harris's current heart issue is the same as the one he experienced with the Cleveland Browns, but, to date, Harris has ***never*** received a diagnosis of his 1984 heart condition. *Id.* at 120:10-121:7; 176:12-14; 193:1-24. After he left the NFL, Harris did not suspect a causal connection between his injuries and the Medications he was administered during his career

(*id.* at 176:18-22; 177:3-9; 224:18-24; 226:1-11; 281:3-9), and the first time any doctor suggested such a connection was in 2014. *Id.* at 208:5-24; 193:22-195:24; Answer to 3rd Set of Interrogatories at 13.

Carreker: Carreker specifically testified that his current injuries are separate and distinct from those alleged in previous claims for on-field and practice-related injuries, and that they were caused by the Medications administered by Defendants. Carreker Deposition ("Carreker Depo.") at 302:15-303:22. Carreker had no reason to suspect any causal connection between his present-day injuries and the Medications administered while playing until a September 2013 ER visit, when a doctor informed him that the Medications had compromised his immune system, possibly leading to an infected heart condition. *Id.* at 304:8-305:16; Answer to 3rd Set of Interrogatories at 13.[15] During his playing years, Carreker was not told what medications he was taking (Carreker Depo. at 89:8-89:11), nor informed of the possible side effects of the Medications dispensed to him. *Id.* at 122:15-18; 125:1-16. When he did ask doctors or trainers what he was being given to take, he was simply reassured that the Medications would work. *Id.* at 83:5-15. And because he trusted the team doctors (*id.* at 83:1-4), Carreker never had any reason to doubt the safety of the Medications he received while playing and it "never dawned on [him]" to question the way the Medications were dispensed to him. *Id.* at 120:4-23.

Lofton: Lofton currently suffers from both internal organ damage[16] and constant musculoskeletal pain. Lofton has specifically averred that no person has yet told him that he was injured or harmed by the Medications he took in the NFL (Answer to 3rd Set of Interrogatories at

[15] Defendants do not appear to challenge that Carreker's heart condition was discovered well within the statutory limitations period.

[16] Contrary to Defendants' assertion, the SAC contains sufficient allegations to connect Lofton's elevated creatinine levels to Defendants' wrongful conduct. Moreover, that Lofton was diagnosed as having elevated creatinine in 2009 or 2010 does not bar his claim because he was not on notice of the causal connection between his injury and the Medications until March 2014.

13) and that he did not know of the link between the Medications he took during his playing career and his current injuries until March 2014, at which point he finally came to understand that connection and the wrongs he suffered at the hands of Defendants. Lofton Deposition at 194:22-195:10; 218:17-220:4. Prior to March 2014, Lofton had no reason to inquire into the side-effects or the long-term risks of the Medications he was given because he trusted his team doctors, gave them complete control to treat him, and felt had no reason to doubt them. *Id.* at 84:22-85:10; 122:10-21; 137:20-22; 156:17-18. In fact, Lofton earnestly believed that he was given the Medications in the NFL in order to help ***treat*** his injuries. *Id.* at 104:4-13.

Sadowski: Sadowski currently suffers from musculoskeletal pain that he ***now*** attributes to the Medications he took while playing professional football, but prior to March 2014, Sadowski had no reason to suspect that he was suffering any injury as a result of the Medications he received while playing. In fact, when he did come to realize the connection between the Medications he had taken while playing, he was "blown away" that he and his colleagues were never told of the risks. Sadowski Deposition at 167:17-169:24. Sadowski trusted his trainers' and doctors' knowledge and expertise. *Id.* at 63:25-64:3; 100:14-101:2; 188:12-16. Based on trainers' representations, he also trusted that when they gave him the Medications to help him play injured, it was safe for him to do so. *Id.* at 94:3-95:14; 165:10-17. Further, his doctors and trainers never warned him about the possibility of side effects of either prescription or over the counter medications. *Id.* at 96:16-18; 155:21-156:2. Sadowski continued to trust in his trainers' and doctors' expertise and representations, and indeed, they so effectively inoculated him against any doubt of their authority, that he did not question other doctors post-retirement about the possible impact of the Medications he took while playing professional football. *Id.* at 277:17-19; 318:17-319:18. To date, no doctor has told him that these injuries are linked to taking the Medications (Answer to 3rd Set of Interrogatories at 13).

Goode: Though some of Goode's current musculoskeletal pain continued from injuries he experienced during his career with the NFL, what began then as minor aches has been "getting worse and worse" over the years. Goode Deposition ("Goode Depo.") at 161:15-163:12. During his playing career, and until March 2014, Goode had no reason to suspect there could be any long-term side effects or risks to the Medications trainers gave him to treat those injuries. *Id.* at 64:20-65:17. Moreover, he specifically alleged that he attributes his injuries to "the injuries he suffered in the NFL that were masked by the Medications, or the Medications themselves…" SAC, ¶258. Further, it is undisputed that Goode did not know of his renal cell carcinoma, nor the possible link to the medications he was administered by the Colts, until 2015. Goode Depo. at 165:20-166:7; Answer to 3rd Set of Interrogatories at 13.

Graham: Graham suffers from significant musculoskeletal pain in areas he injured while playing. Graham Deposition at 260:11-18. However, he only first learned in March 2014 of the connection between the "kind of medicine" that he and his teammates were taking and how they could create "problem[s] that . . . [he is] having now as part of [his] injuries." *Id.* at 23:21-24:2. Graham testified that he clearly differentiates between the risks of injury and effects of playing football, which he knew, and the risks of taking the Medications, which he did not. *Id.* at 222:11-223:15; 313:1-314:9; 366:8-22. Graham trusted the team doctors (*id.* at 128:8-18) and believed that the Medications he received when injured was used to treat and heal his injuries (i*d.* at 156:14-19; 188:23-189:8; 184:12-15). Neither team doctors nor trainers explained to him the risks or possible side effects of the Medications (*id.* at 166:4-12; 183:12-14; 202:7-203:1; 347:6-22; 352:3-8; 358:7-361:10). Following his retirement, he did not question other doctors about risks of the Medications (*id.* at 269:18-21; 274:4-6; 275:3-12; 349:5-21), and to this day no person has told him that he was injured or harmed by his consumption of the Medications. Answer to 3rd Set of Interrogatories at 13.

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William N. Sinclair
Steven D. Silverman
Stephen G. Grygiel
Phillip J. Closius
Alexander Williams
SILVERMAN|THOMPSON|SLUTKIN|WHITE|LLC

/s/
William N. Sinclair

201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432

Thomas J. Byrne
Mel T. Owens
NAMANNY BYRNE & OWENS, P.C.
2 South Pointe Drive, Suite 245
Lake Forest, CA 92630
Telephone: (949) 452-0700
Facsimile: (949) 452-0707

Stuart A. Davidson
Mark J. Dearman
Jason H. Alperstein
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
Facsimile: (561) 750-3364

Rachel L. Jensen (SBN 211456)
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: (619) 231-1058
Facsimile: (619) 231-7423

Attorneys for Plaintiffs